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1 P R O C E E D I N G S

2 (11:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 12-138, BG Group v. The Republic
5 of Argentina.

6 Mr. Goldstein.

7 ORAL ARGUMENT OF THOMAS GOLDSTEIN

8 ON BEHALF OF THE PETITIONER

9 MR. GOLDSTEIN: Mr. Chief Justice, and may
10 it please the Court:

11 We ask you to resolve this case narrowly by
12 reaffirming that an arbitrator, rather than a court,
13 presumptively resolves a dispute over a precondition to
14 arbitration. That holding would decide the question
15 presented and would resolve the circuit conflict and
16 govern 99 percent of the cases in the lower courts.

17 Argentina wants you to decide a different
18 issue. Its position in this Court is that there is no
19 arbitration agreement with my client in the first place,
20 so it says a precondition to that non-existent agreement
21 is irrelevant. Now --

22 JUSTICE SOTOMAYOR: Mr. Goldstein, do you
23 take the position that parties can't, by contract, say,
24 this particular precondition is -- goes to my -- to the
25 parties' consent to arbitrate?

1 MR. GOLDSTEIN: We do not take that
2 position. If a party were to say that, as the
3 governments in NAFTA have done, as the Solicitor
4 point -- Solicitor General points out is the language of
5 the U.S./South Korea Bilateral Investment Treaty, unlike
6 this one, we think it would be settled that a Court
7 would resolve the dispute.

8 JUSTICE SOTOMAYOR: All right. So if the
9 issue is what did the parties -- as I see it -- what did
10 the parties intend on this question, why isn't the first
11 options Howsam divide the one that we should follow in
12 this setting? The Solicitor General is suggesting that
13 we shouldn't follow that. We should give some sort of
14 heightened deference to the foreign state, but I'm not
15 sure why because the issue is always about what did the
16 parties intend.

17 And, if the issue is always about that,
18 don't we look at the text, the custom and practice of
19 the industry, the behavior between the parties? Don't
20 we look at all of the factors we normally look at in
21 deciding whether something goes to a substantive or
22 procedural issue?

23 MR. GOLDSTEIN: Yes. So let me see if I --

24 JUSTICE SOTOMAYOR: All right. So it's not
25 that we hold, absolutely, that in every situation a

1 precondition is subject to an arbitral decision. We
2 look to those -- to the issue of consent, don't we?

3 MR. GOLDSTEIN: Well, a couple of things
4 about that. You do -- you have held in *Howsam* that, if
5 there is a precondition to arbitration, it is
6 presumptively decided by the arbitrators, rather than
7 the courts, so that --

8 JUSTICE SOTOMAYOR: Maybe that's why the
9 government is saying, we shouldn't treat it as a
10 presumption, we should just treat it as --

11 MR. GOLDSTEIN: All right. Maybe I can help
12 by locating the parties' different arguments in this
13 case because there are a lot of them. We have said, of
14 course, that we think you should decide the question
15 presented. Argentina wants you to go beyond the
16 question presented. We can talk about whether that's
17 appropriate.

18 If you did decide the question of consent, I
19 think you would do it in a three-part opinion, and some
20 of the parts are contested, and some aren't. This is
21 how I would write the opinion: Part one would say look
22 at our decision in *Howsam*, and it's undisputed here that
23 if this was an ordinary contract case, just between two
24 American companies, then BG Group would win because this
25 looks just like a procedural precondition.

1 It's like the John Wiley staged grievance
2 procedure, and I don't think the other side argues
3 against that.

4 Then the other side has given you two
5 different arguments for why you wouldn't apply Howsam
6 and why you might have a different analytical framework.
7 The first argument, we could call it part two of the
8 opinion, is the argument of the United States. And what
9 the United States says is, look, the difference between
10 this and Howsam is it's an international case.

11 And what's different in international cases
12 is that, when you dealt with Howsam, you dealt with a
13 set of expectations between parties agreeing to
14 arbitrate that may not apply in the international
15 context, and so maybe it's different.

16 Now, this -- and the reason they say that
17 it's different is that an international case, when it's
18 cited in the United States, is governed by the New York
19 Convention. And in a New York Convention case, whether
20 it's a commercial case, whether it's an international
21 treaty arbitration case, what the rule of judicial
22 review is -- and that's what we're looking at here, do
23 the arbitrators finally decide the question, or does a
24 court, on judicial review, decide it?

25 In a New York Convention case, you look to

1 the law of the citeus, here, the United States, the
2 Federal Arbitration Act. So I take the Solicitor
3 General's position to be this: Look, when you have
4 Argentina arbitrating against a company from the United
5 Kingdom, then the Argentine company and -- excuse me --
6 Argentina and the UK Company don't have any ex-ante
7 understanding about whether the dispute will be finally
8 resolved by a court or, instead, the arbitrators because
9 who knows where the arbitration would occur. Here, it
10 occurred in the United States.

11 Our answer is that this objection answers
12 itself. It's true that they don't have a specific
13 judicial system, that it will be ahead of time when they
14 sign the treaty -- Argentina signs a treaty with the
15 United Kingdom. They don't know whether a dispute over
16 this precondition will be resolved de novo or, instead,
17 it will be resolved deferentially because they don't
18 know where the arbitration will occur, but they do know
19 that the applicable law will be the citeus of the
20 arbitration. And there is precedent on this.

21 The government's argument here is about
22 international arbitration governed by the New York
23 Convention. There are 149 signatories to the New York
24 Convention. There have been thousands of challenges to
25 arbitral awards under the New York Convention. And we

1 are unaware of any precedent from any country, ever,
2 that says we are going to not apply our domestic system
3 set of rules, here, the Howsam first options lines,
4 because this is an international case.

5 We know that --

6 JUSTICE ALITO: I'm not sure that this
7 argument helps you, but it's your argument. But this
8 arbitration took place in the United States because the
9 parties agreed that's where it would take place, right?

10 MR. GOLDSTEIN: Correct.

11 JUSTICE ALITO: So your -- your argument is
12 that, by agreeing that the arbitration would take place
13 in the United States, they bought into U.S. arbitration
14 law, no international modification?

15 MR. GOLDSTEIN: That's correct. And that is
16 what has been true in every New York Convention case
17 ever decided in the United States and, so far as we are
18 aware, every case decided by every New York Convention
19 signatory because they have -- they are accepting a body
20 of rules. When you were trying to confirm or overturn
21 the award, they agreed to put it here. That's how it --

22 JUSTICE ALITO: See, I would have thought
23 that there would -- there'd be an argument for saying
24 that the first options principle shouldn't apply to
25 international -- or to a bilateral investment treaty.

1 The whole point of these treaties, as I
2 understand it, is to take these disputes out of the
3 courts because of distrust, at least of the courts of
4 the country against which the claim is asserted and --
5 and put it in an international tribunal where some sort
6 of standard international principles would apply, but
7 that's -- you don't like the idea.

8 MR. GOLDSTEIN: No, that's part three of the
9 opinion. I just haven't gotten there. Here's the
10 reason why, and that is, the government's argument about
11 the New York Convention doesn't have anything to do with
12 investment treaties. It's about the New York
13 Convention.

14 And so it applies -- a company from Japan
15 sues a company from Ecuador, and they arbitrate in the
16 United States. So the government's position has very
17 wide-ranging consequences for any international
18 arbitration in the United States.

19 Now, Argentina does make the argument that
20 you've described, and this is the next part of the
21 opinion, if we got past the government's position, which
22 I don't think has any precedent for having a special
23 international rule, we come to Argentina's argument.
24 And Argentina says this: Look, the reason this isn't
25 Howsam is that this is a unilateral contract,

1 effectively, and that is, we put our treaty out there,
2 and now, BG Group has to do something in order to create
3 an arbitration agreement in the first place because we
4 don't have an arbitration agreement with them, we have a
5 consented arbitration, then, because of that, call it a
6 precondition, call it whatever you want, because an
7 arbitration agreement hasn't formed, the arbitrators
8 have no power to decide anything, and, therefore, you
9 can't defer to their judgment.

10 We would never expect them to have the power
11 to decide anything Argentina says because there's no
12 arbitration agreement at all. So that's the next part
13 of the opinion, and it will get to the points you
14 raised, Justice Alito.

15 JUSTICE ALITO: Could I ask you just a -- a
16 practical question and maybe the answer to this is
17 obvious. Is it too late, now, for you to begin
18 litigation in Argentina? Wait 18 months and then pursue
19 arbitration?

20 MR. GOLDSTEIN: It is not. There is a
21 principle of laches, but there is an equivalent
22 principle of equitable tolling, so it's true that we
23 could go there. I do think, ultimately, it's a point in
24 our favor because it shows how pointless this exercise
25 is.

1 We'll recall, of course, that while we could
2 leave -- we could file a claim in the Argentine courts,
3 the Argentine courts, of course, would have the power to
4 do nothing at all. They couldn't bind us. They
5 couldn't bind Argentina. They wouldn't have to decide
6 the case in the first place, and then we would be back
7 here.

8 And the question is, if you have a provision
9 like that, which is, effectively, go wait in the
10 Argentine courts, does anybody seriously think that that
11 determines your consent to arbitrate, when it is that
12 that act, going and sitting, can't have any effect on
13 the case whatsoever. Do we really --

14 CHIEF JUSTICE ROBERTS: Well, that's not
15 true. There are numerous statutory regimes where
16 Congress has decided, for example, it's valuable to give
17 people a period of time to negotiate or discuss before
18 you can go into -- into court. I mean, the EEOC and
19 other sorts of things saying, let's everybody -- you
20 know, step back, you have to negotiate for six months or
21 you can't sue for another eight months.

22 And a lot of times, nobody think that's
23 going to change anything, but you can understand
24 Argentina or any other country saying, look, before
25 we're going to arbitrate -- you know, try our courts,

1 you may find -- you may be surprised, right?

2 MR. GOLDSTEIN: We would be.

3 (Laughter.)

4 MR. GOLDSTEIN: But, Mr. Chief Justice, my
5 point isn't that it's not important. I'll give them
6 that it's important; they negotiated for it. My point
7 is that whether it's important or not doesn't tell you
8 if it's a procedural step or a substantive step, in
9 terms of their agreeing to arbitrate with us.

10 JUSTICE KENNEDY: Well, then, let me just
11 make clear where we are. Suppose we -- or at least I,
12 were to conclude that the court of appeals was right,
13 that it is for the Judicial Branch to decide whether
14 there is an arbitration agreement and duty to arbitrate.
15 Then I were to further conclude that, given Argentina's
16 position, they have waived the judicial requirement and
17 that this arbitration should proceed. I can't reach
18 that second question because it wasn't raised.

19 MR. GOLDSTEIN: Justice Kennedy, the way you
20 would resolve that issue, I believe, is to get to
21 Argentina's argument that it did not consent to
22 arbitration, that there is no -- there is now
23 arbitration agreement in the first place, you would have
24 to go outside the question presented to begin with.

25 Remember, the question presented that you

1 granted certiorari on, to resolve a very distinct
2 circuit conflict at the urging of the arbitration
3 community was what do we do if we have an arbitration
4 agreement and this is a precondition to arbitration?

5 If you were going to decide the antecedent
6 question, the question before that, is there an
7 arbitration agreement at all, which is my part three, it
8 is the argument that Argentina is raising in this Court,
9 then I think you have to carry it all the way through.

10 JUSTICE KENNEDY: Well, let me just put
11 it -- I think there is -- this is a close case. I think
12 there is substantial merit, the United Kingdom court is
13 correct and that the court of appeals here is correct,
14 as to the authority of the Court to decide the issue. I
15 also think that they are probably wrong on the merits,
16 but I cannot reach that second question. It wasn't
17 presented.

18 MR. GOLDSTEIN: Well, I agree with you,
19 Justice Kennedy, that if you were asking me did the D.C.
20 Circuit correctly interpret the treaty and decide -- I
21 misunderstood you. You have asked me, look, I see the
22 D.C. Circuit's decision, which is three sentences long,
23 on the question of whether they can invoke this waiting
24 period, and I see the arbitrators, they're the experts.
25 It's much more substantial.

1 If you accept the United States' argument to
2 remand this case, which neither of the parties think you
3 should, then it could be -- you could suggest to the
4 D.C. Circuit it could reopen it.

5 But, otherwise, I'm going to agree with you,
6 Justice Kennedy. I am a believer that you should stick
7 with the question presented and the arguments that are
8 properly presented to you.

9 Let me try, then, to deal with your point
10 about the United Kingdom court and the point about how
11 courts decide if there is an arbitration agreement. We
12 actually agreed that you -- you are obviously a court --
13 you need to decide if there is an arbitration agreement
14 here. You do decide that de novo.

15 The point that I want to get to in the part
16 three of an opinion that I am imagining is that there
17 clearly is an arbitration agreement here, and I am going
18 to come to that in one second. I will just bracket the
19 point about the United Kingdom. Remember that, as I
20 said with the New York Convention, the United Kingdom
21 has one system for reviewing arbitral awards,
22 Switzerland has another, we have another one.

23 What you need to look to, I think, is your
24 own body of law because each one of those systems is
25 because of not some great principle --

1 JUSTICE GINSBURG: Mr. Goldstein, you have
2 given us three parts for an opinion.

3 MR. GOLDSTEIN: Yes.

4 JUSTICE GINSBURG: Is it your position,
5 essentially, that, under this bilateral agreement, the
6 case is to be decided by an arbitrator, not by a court
7 in Argentina or the United States? And so the question
8 is when an arbitrator will decide the case. And so the
9 question of when doesn't say whether it's an agreement
10 or not. It just says, did you sue too early, you
11 started -- you started too early?

12 Is that your essential position, that this
13 bilateral agreement says arbitration is the way this
14 dispute gets decided, and everything on the way to that
15 is what you call a preliminary question, but,
16 essentially, the parties have agreed that their disputes
17 will be solved by arbitration?

18 MR. GOLDSTEIN: Yes. And can I maybe take
19 you to the treaty itself and explain what I think are
20 the questions for courts and what I think are the
21 questions for the arbitrators? Because I actually think
22 it's pretty clear from the treaty. It's in our Blue
23 Brief in the appendix.

24 Justice Ginsburg, the answer to your
25 question is yes, and I will explain how that plays out

1 under the treaty. So this is the agreement that
2 Argentina made with the United Kingdom, and the dispute
3 resolution starts at Page 8A, it's Article 8.

4 Now, there are three conditions in this
5 agreement on Argentina's consent to arbitrate. It does
6 have to agree, and we had to do something. We had to
7 invest. And those three conditions are set out in the
8 first sentence of the dispute resolution provision.

9 It says -- and I am now on Article 8, Roman
10 I. "Disputes with regard to an investment," so this
11 arbitration provision is only going to apply to an
12 investment, which is a defined term under the treaty,
13 "which arises within the terms of the agreement." So it
14 has to be a treaty claim. "Between an investor of one
15 contracting party and the other contracting party."

16 And so that is it has to be a U.K. investor
17 suing an -- seeking to arbitrate against an Argentine
18 company. And those are -- if those things aren't true,
19 there is no arbitration agreement.

20 Now, that -- that language that I just read
21 to you is from the local litigation provision, and then
22 the treaty says the exact same body of disputes are
23 eligible substantively for arbitration.

24 CHIEF JUSTICE ROBERTS: Well, that's -- it
25 seems to me that this is a difficulty for you, the

1 structure of the treaty. I mean, if you just end it
2 after one, nobody would say, oh, they must be
3 contemplating arbitration or arbitration is in the
4 background. They would say, look, you have got a
5 dispute, if you don't resolve it, you bring it in court.

6 MR. GOLDSTEIN: Right.

7 CHIEF JUSTICE ROBERTS: Nothing about
8 arbitration even in the background. Then they say, if
9 you want to go to arbitration, you can. So, when you
10 look at just the structure, it seems to suggest that
11 Article I -- 8(I) is not part of the arbitration
12 provision. It stands there and says, this is what you
13 do, and then the arbitration kicks in later.

14 MR. GOLDSTEIN: I'll agree with that, but I
15 just don't think you can ignore the rest of it. And so
16 let me explain why that's true. So as I said, those
17 three conditions apply to the arbitration provisions, So
18 I'm at the top of 9A.

19 "The aforementioned disputes" -- those are
20 the ones that meet the three conditions -- "shall be
21 submitted to international arbitration." And then,
22 Mr. Chief Justice, it turns immediately to the
23 relationship between the local litigation and the
24 arbitration. And it's common ground that, in the
25 example that you gave, if you had just part one -- and I

1 just think it's really important by you,
2 Mr. Chief Justice, and that is, if this provision said,
3 go litigate in the local courts, come what may, this
4 would be a completely different case.

5 But this provision is wildly different from
6 that. It says, go to the local courts; whatever they
7 do, it makes no difference. It cannot stop the case, it
8 can't change the issues that will be arbitrated, it
9 can't have any effect on the arbitrator's decisions. It
10 is exactly like a waiting period, which exists in every
11 international --

12 CHIEF JUSTICE ROBERTS: Well, that -- your
13 argument would be better there if this was Article 8 --
14 you know, arbitration of disputes or -- you know,
15 parties can arbitrate, but, first, they must do this.
16 No, it just -- you know, says settlement of disputes.
17 The first thing is you can go to court here. The second
18 thing is, if you want to arbitrate, you do this.

19 MR. GOLDSTEIN: Okay. Mr. Chief Justice,
20 but then I would just take you to the next page, sub 4,
21 and we understand what the answer to that ambiguity
22 perhaps is, the last sentence, "The arbitration decision
23 shall be final and binding on both parties." That is
24 the only body under this treaty that can issue a
25 decision that decides the parties' dispute. It's only

1 the arbitrators. Now --

2 CHIEF JUSTICE ROBERTS: If you want to
3 accept the invitation to arbitrate that is in 8(II). If
4 you don't, if you go to 8(I), which doesn't say
5 anything, then, presumably, the decision of the tribunal
6 will be binding.

7 MR. GOLDSTEIN: Fair enough -- no, that's
8 not quite right, Mr. Chief Justice, because, remember,
9 imagine that we went to the Argentine courts, and for
10 the first time ever, we won. And so that an Argentine
11 court told the Argentine state, you know, we actually
12 think you should pay this company \$200 million.

13 What would happen then is that Argentina can
14 take the question to arbitration, but nothing about the
15 local court's decision binds anyone. We -- there is
16 never a point at which you can say that the investor
17 will abide by or be bound by a decision of an Argentine
18 court under this system. That's what's so unusual about
19 it.

20 Perhaps I can explain why it's there --
21 because it is odd, I will tell you, and I will tell you
22 that, in deciding this question that Argentina is adding
23 to the case, in the context of this local litigation
24 provision, it is a very strange vehicle to do that.
25 There are only -- only 1 percent of bilateral investment

1 treaties have this provision. It's a historic remnant.

2 It's in -- of the first 15 bilateral
3 investment treaties that Argentina agreed to, it's in
4 nine of them. In the subsequent 40 of them, it doesn't
5 appear at all, again, a good example of how it isn't
6 really a condition on their consent.

7 And it is a remnant of an era of espousal.
8 It used to be the case that, before these treaties, that
9 an investor in BG's position would have to go to the
10 Argentine courts. And when Argentina first created the
11 investment treaties, it kind of liked the idea that you
12 had to spend some time in the courts.

13 But no one would agree to the treaty -- this
14 is Justice Alito's question earlier -- no one would ever
15 agree to these treaties if they didn't know that the
16 decisionmaker would be the neutral, expert arbitrators,
17 and so it just has this you-have-to-wait-in-court feel
18 to it. But it is absolutely critical that we look at
19 the substance of the provision.

20 It's very much, Mr. Chief Justice, like the
21 John Wiley case, which is structured, one, you will have
22 step one of our grievance process; step two, within five
23 days you have to go to our next step of the grievance
24 process; step three, then you can go on to arbitration.
25 It could have stopped, theoretically, at any of those.

1 If you had given up at step one or two, you would well
2 have been bound by it.

3 But the question you are being asked here,
4 if we could just return to if you are trying to decide
5 this de novo or, instead, defer to the arbitrator's
6 interpretation of whether this litigation provision is
7 binding, is, fundamentally, when Argentina went into
8 this treaty, did it think that the arbitrators were
9 going to resolve the disputes? Right?

10 Did it expect -- it's a question of consent,
11 Justice Sotomayor -- did it expect that the answers to
12 these questions would come from the arbitrators or,
13 instead, the courts?

14 And when we are talking about the process
15 for getting it going -- Justice Ginsburg talked about
16 the timing, do you have to do this for 18 months, there
17 is another provision here about 3 months, the natural
18 understanding is that there is an arbitration agreement,
19 Argentina knew that it could only get this treaty if
20 there was a guarantee to the investors that they would
21 be able to arbitrate, and so expects the arbitrators to
22 decide this.

23 Imagine Argentina's world, if you will.
24 Argentina's world is that every timing question, whether
25 something has to be filed on blue paper -- I have no

1 idea what the line they want to draw is. Every
2 procedural step is, instead, a condition on its consent
3 to arbitrate, and that doesn't seem to make any sense at
4 all. There have to be procedural prerequisites.

5 And Argentina would recharacterize this as,
6 as I said, a unilateral agreement. So it's like
7 Argentina says -- posts a sign on a pole and says, if
8 you pay me -- if you find my dog, I will give you \$100.
9 And so you have to perform an act. And it says we have
10 to perform an act here. We have to go to the local
11 courts, or otherwise, there is no agreement at all.

12 Well, a few things about that. Arbitration
13 is not a dog, and Article 8, if we just go back to page
14 8A, does not require us to submit it to the local courts
15 at all. This can't be a step that we are required to
16 take because we are not required to take it.

17 If I could just take you to the last two
18 lines of it? "It shall be submitted at the request of
19 one of the parties to the dispute." Argentina was just
20 as entitled as us to put this into the local courts as
21 we were. It can't have been an expectation that we had
22 to do something before it would consent to arbitration.
23 And so I do think that this is just on all fours with
24 John Wiley for that -- for that reason.

25 The only other thing that has been put on

1 the table in front of you is the question of whether
2 Argentina's sovereignty should make a difference here.
3 And this is kind of the second theme of the brief of the
4 United States.

5 And I would say about that that the Foreign
6 Sovereign Immunities Act, which was discussed, of
7 course, in the last argument, has an express waiver of
8 sovereign immunity for arbitration awards that's
9 controlled here.

10 And if -- when the Solicitor General's
11 representative speaks, talked -- if that person were to
12 talk about what the treatment of these issues in other
13 countries is, we are unaware, again, of any country in
14 the world where the arbitral system of review in the
15 courts changes in the slightest because one party
16 happens to be a signatory to a treaty, and that makes a
17 ton of sense.

18 Again, this is fundamentally a commercial
19 relationship. Argentina knew that it couldn't, in
20 its -- in the crisis that gave rise to these investment
21 treaties, Argentina couldn't get the money to come into
22 the country if it hadn't agreed to arbitration.

23 JUSTICE SOTOMAYOR: Counsel, what do you do
24 with Wintershall?

25 MR. GOLDSTEIN: So, Your Honor, I think that

1 there are a variety of cases out there that deal with
2 the question in other jurisdictions of different ways of
3 reviewing arbitration awards. And those are unique to
4 their own arbitral system. We've cited decisions
5 from -- a decision from France, for example, that
6 follows your Howsam line.

7 The important point I would make is that
8 there is -- when the other side points to decisions in
9 which a court reviews de novo a jurisdictional ruling of
10 an arbitral tribunal, none of those decisions are unique
11 in any way to the fact that it was an international
12 arbitration or an international treaty arbitration.

13 Their international rule, the U.K. rule, the
14 rule in lots of other countries, is simply about
15 arbitration. The reason that the other side can say
16 that this case might well be reviewed de novo in the
17 United Kingdom, for example, is that the jurisdictional
18 decision in essentially every arbitration of any kind in
19 the United Kingdom will be reviewed de novo.

20 They just have a different approach to these
21 questions.

22 JUSTICE GINSBURG: Isn't that the same thing
23 in France, which is supposed to be a popular place for
24 international arbitration, that, in the first instance,
25 the arbitrator decides, but, ultimately, the court can

1 review everything?

2 MR. GOLDSTEIN: That is not the most current
3 view, Justice Ginsburg. In a case called Nihon Plast,
4 which was the most recent court of appeals decision in
5 France in 2004, the court adopted the
6 procedural-substantive distinction that very much
7 parallels Justice Breyer's opinion in the Howsam case.

8 But, even if it were the case, it's because
9 the French have their own approach to arbitration. We
10 have a system that says, look, if you can always run off
11 to court because of any of these procedural
12 objections -- it has to be on blue paper, you didn't
13 write -- wait for the -- wait 30 days, another great
14 example would be, in lots of arbitration provisions, you
15 have to submit a sufficiently detailed statement of
16 claim to the arbitrators.

17 Well, that would be --

18 JUSTICE KENNEDY: Do I understand your
19 position that, in this case, you did not have to go to
20 the Federal -- to the Argentine court, by reason of the
21 language in this agreement and not by reason of anything
22 that Argentina did?

23 MR. GOLDSTEIN: The language in the
24 agreement meant that what Argentina did disentitled it
25 from being able to rely on this provision. I will take

1 you, quickly, if you don't mind, to the provisions of
2 the treaty so you know what I am talking about. There
3 are two of them.

4 One is the one that the arbitrators relied
5 on, and that is in the arbitration provision 8-4, which
6 is on 10A, it says, "The arbitral tribunal shall decide
7 the dispute in accordance with the provisions of this
8 agreement, the laws of the contracting party involved in
9 the dispute, including conflict of laws," and, then, at
10 the end of the sentence, "the applicable principles of
11 international law."

12 So this exhaustion requirement -- it's not
13 even an exhaustion requirement -- the local litigation
14 requirement is subject to international law. And then
15 earlier -- and so three other tribunals have reached the
16 same conclusion as this one, that you -- for that reason
17 of that provision, you can't rely in the particular
18 circumstances on the local litigation. And then Article
19 3 --

20 JUSTICE SCALIA: Say that again.

21 MR. GOLDSTEIN: Sorry.

22 JUSTICE SCALIA: By reason of --

23 MR. GOLDSTEIN: There are three other
24 tribunals --

25 JUSTICE SCALIA: Yes.

1 MR. GOLDSTEIN: -- that have reached the
2 same conclusion as this one, and that is Argentina can't
3 rely on the local litigation provision because it
4 effectively closed the courthouse doors. It's own
5 conduct disentitled it.

6 Then ten other tribunals have reached the
7 same conclusion based on Article 3, the most favored
8 nation provision, because this requirement doesn't exist
9 in the Argentina/U.S. BIT. There are only three
10 tribunals -- to be clear, only three tribunals out of 16
11 or 17 have agreed to enforce it.

12 If I could reserve the remainder of my time?

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Ms. Anders.

15 ORAL ARGUMENT OF GINGER D. ANDERS,
16 FOR UNITED STATES, AS AMICUS CURIAE,
17 SUPPORTING VACATUR AND REMAND

18 MS. ANDERS: Mr. Chief Justice, and may it
19 please the Court:

20 The government's position in this case is
21 based on the fact that this case involves a bilateral
22 investment treaty in which the states' parties set forth
23 a standing offer to arbitrate in the treaty itself.
24 Because it's the treaty that determines whether there is
25 an arbitration agreement in this case, principles of

1 treaty interpretation have to be used to assess whether
2 there is an agreement.

3 So, therefore, applying the domestic law
4 presumptions that are set forth in *Howsam* to this type
5 of investor-state arbitration we think would not be
6 appropriate. *Howsam* shouldn't apply by its terms
7 because the question here is a question of treaty
8 interpretation, not a question of the likely
9 expectations of parties to a domestic commercial
10 contract.

11 JUSTICE SCALIA: I must say I don't follow
12 that -- that line of argument. I mean, it seems to me
13 the treaty sets the framework for an agreement, but it
14 is ultimately the agreement that governs.

15 MS. ANDERS: Well, there is no agreement
16 unless the investor submits the claim to arbitration in
17 accordance with the terms of the treaty, the conditions
18 on the state's consent. So, for instance, in the United
19 States investment treaties and free trade agreements
20 such as NAFTA the United States says that an investor
21 may submit a claim to arbitration only if it first
22 satisfies certainly procedural conditions.

23 JUSTICE BREYER: I don't -- I can't find --
24 it seems to me this has sprung, full blown, from
25 someone's brain, but is not well embedded in any law

1 that I could yet find. That is the -- this is not meant
2 to be rude. I'm trying to figure out where this idea of
3 the consent thing comes from.

4 After all, it apparently comes from our
5 Korean treaty and maybe one other, but I can't find it
6 in -- I can't find -- the question in the case is, is
7 this particular agreement, namely an agreement to go to
8 the court first -- shall we count it as that kind of
9 matter as to whether this is arbitrable that goes to a
10 judge? Or rather is it that kind of procedural
11 Howsam/Wiley type thing that goes to an arbitrator?

12 Now, we did our best, I think, to try to
13 explain how to distinguish the one from the other in our
14 precedent. Now, you use different words. You use these
15 words about "consent," which doesn't appear anywhere in
16 this treaty, but I think you are trying to get at the
17 same thing.

18 And if you are not trying to get at the same
19 thing, why? Why not? What are you trying to get at?

20 MS. ANDERS: Well, I think the reason that
21 applying Howsam and its presumption that certain
22 procedural-type requirements, like notice requirements,
23 would be decided by the arbitrator, the reason that
24 would risk subjecting a state to suit without its
25 consent is that, in investment treaties, what the states

1 do is they say we will be subject to arbitration under
2 certain circumstances.

3 But they also place limitations on their
4 consent to that adjudication, in order to satisfy
5 important sovereign --

6 JUSTICE SOTOMAYOR: Are you suggesting that
7 they --

8 JUSTICE BREYER: So you suggest it was the
9 state that said, Look, they don't say anything in the
10 treaty, but it turns out, for purposes of counting time
11 limits, filing a brief, they count Saturdays, but they
12 don't count Sundays. All right? And the government
13 says, quite sincerely, if we had known that they were
14 going to do that, we never would have agreed.

15 I am trying to get an example of something
16 that is as purely procedural as I can imagine, something
17 no one in his right mind would think a judge, rather
18 than an arbitrator, should decide. But, under your
19 rule, you're going to say the judges decide that and not
20 the arbitrators, and that is what is bothering me about
21 your rule.

22 MS. ANDERS: Well, they decided them because
23 the state sets forth in the treaty itself that these are
24 limitations on their consent.

25 JUSTICE BREYER: By the way, in the treaty

1 itself, you can have dozens of things, as was true of
2 Howsam, we will follow the UNCTAD, whatever that is, the
3 UN -- or AAA rules, and you look up AAA Rule No.
4 1872(b), and it says just what I said. Okay? So, now,
5 it's in the treaty itself, and why should that matter?

6 MS. ANDERS: Because, for instance, what the
7 United States has done in negotiating its treaties and
8 free trade agreements for decades, in every one of these
9 agreements, is it has said, we need to limit the
10 circumstances in which we --

11 JUSTICE BREYER: I have only found two, by
12 the way. One was Korea, and I can't remember the
13 second.

14 MS. ANDERS: Well, we cited in our brief the
15 Korea and --

16 JUSTICE BREYER: But in any case --

17 MS. ANDERS: -- and NAFTA.

18 JUSTICE BREYER: -- you explicitly say,
19 these are our conditions of consent, and you raise the
20 question to me, you don't answer it, because suppose one
21 of those conditions had to do with blue paper, rather
22 than white paper, suppose that they were just what I
23 said, nobody still would think the United States was
24 resisting arbitration on such a matter.

25 MS. ANDERS: Well, to give you an example of

1 a condition that we've actually used, NAFTA requires, as
2 a condition on the United States' consent to arbitrate,
3 that the investors, when they submit the claim to
4 arbitration, they waive their right to pursue other
5 remedies, and that satisfies a very important sovereign
6 interests that we have and not being subject to parallel
7 proceedings --

8 JUSTICE BREYER: So, here, you are putting
9 yourselves, I gather, that the UN rules, the AAA rules,
10 the scholars who file our briefs, the Doctrine of
11 Competence-Competence, whatever that might be, is, in
12 fact, far broader than what they want. It submits
13 virtually every question of arbitrability to the
14 arbitrator. And the United States is taking a position
15 quite contrary, I guess, to most of the world.

16 MS. ANDERS: I don't think that's correct,
17 Justice Breyer. What we are -- what we are saying is
18 that, when a condition goes to consent, whether it is
19 fulfilled or not goes to whether --

20 JUSTICE GINSBURG: How do we know that? How
21 do we know that? The question is, is this litigation
22 preliminary -- going to the Argentinian court, is the
23 litigation preliminary a condition on the consent to
24 arbitrate a dispute? What is the answer to that
25 question, in the view of the United States?

1 MS. ANDERS: That's a question of treaty
2 interpretation, and this Court has said that you look to
3 first the text, but you also --

4 JUSTICE GINSBURG: Well, let's say you've
5 done all that. And what does the United States -- the
6 United States is saying, court, you should look to all
7 these sources, and then answer the question, is the
8 litigation preliminary a condition on consent to
9 arbitrate the dispute? So, after looking at the sources
10 that the United States is telling the court it should
11 look to, what is the answer of the United States to that
12 question?

13 MS. ANDERS: Well, the United States doesn't
14 feel that it is appropriate for it to express a
15 definitive view on that question now because the parties
16 have not argued this, really, as a question --

17 JUSTICE KAGAN: I would be more open about
18 that argument, Ms. Anders, if you had at least suggested
19 how we should go about deciding that question.

20 MS. ANDERS: Yes.

21 JUSTICE KAGAN: Because you read this
22 through your brief, and I don't know what a
23 consent-based objection is. In fact, you say
24 consent-based objections can look very, very procedural,
25 and it's still consent-based, or it might not be

1 consent-based.

2 So all the -- the techniques that we use in
3 the Howsam-First Options line of cases seem to go out
4 the window and not be replaced with anything else.

5 MS. ANDERS: I don't think that's -- that's
6 right. I think what you look to, just looking at the
7 text, you can look to whether the text expressly calls
8 something a condition on consent. So, for instance, in
9 NAFTA, NAFTA says that there are certain conditions --

10 JUSTICE SCALIA: But that's no different
11 from the rules we apply when there isn't a treaty, of
12 course. I mean, if the arbitration agreement said that,
13 that the -- you know, the agreement is conditioned on,
14 of course. So what else? What different rules would
15 you apply, other than the common-sense rules that we use
16 for arbitration agreements?

17 MS. ANDERS: Well, you would also -- you
18 would also look, possibly, for mandatory language in the
19 treaty; so, for instance, if the treaty says that --

20 JUSTICE SCALIA: We would look to mandatory
21 language in the arbitration agreement.

22 MS. ANDERS: I think that's right, but the
23 problem with applying Howsam is that it's a presumption
24 that is purely based on the nature of the requirement,
25 so the fact that it is a notice requirement, the fact

1 that it is a time limit, that that means that it's
2 procedural and, therefore, the arbitrators would decide,
3 unless it is clearly stated --

4 JUSTICE ALITO: What about this -- what
5 about this principle: If something, if some requirement
6 seems to serve virtually no purpose, it's unlikely to be
7 a condition of consent. Would you accept that?

8 MS. ANDERS: No, I think that is still --
9 that would be grafting on a default term onto the treaty
10 that may not reflect the treaty parties' intent. I
11 think, when states negotiate for these conditions on
12 consent, what they are looking to are --

13 JUSTICE ALITO: Well, there is nothing in
14 the treaty that talks about consent at all, so we have
15 to decide whether some requirement is a consent, is on
16 something which consent is conditioned, or it's just a
17 procedural requirement that would be decided by an
18 arbitrator.

19 Would you not -- would you disagree with the
20 proposition that, if something really is trivial, it
21 doesn't seem to accomplish much of anything, it's a
22 historical vestige, it's unlikely to be a condition of
23 consent.

24 MS. ANDERS: I think that one of the things
25 the Court could look to is the nature of the

1 requirements, does it serve sovereign functions? But I
2 think, in doing that analysis, it's important to look to
3 what the state says are the functions that its
4 requirements are serving.

5 So for instance, our notice requirement in
6 our treaties, they serve the purpose of giving us
7 advance notice of particular claims and time to correct
8 problems that may have been caused -- you know, that we
9 can correct and, therefore, avoid arbitration to begin
10 with.

11 So I think you would look to the nature of
12 the requirement, the text of the treaty, whether it's
13 mandatory or whether it's expressly conditional. You
14 can also look, obviously, to what this Court has called
15 its interpretation, so that would be the
16 postratification understanding.

17 If this were our treaty, we would bring
18 in -- you know, the letter of transmittal that the State
19 Department had provided after it had negotiated the
20 treaty -- you know, there would be a lot of information
21 like that that a Court could look to.

22 And I think as the Court noted, in the
23 Sumitomo case, you can have similar language in similar
24 treaties that have different meaning because there is
25 different negotiating history or the aids to

1 interpretation point different ways.

2 So our point here is that it's a matter of
3 treaty interpretation and that you simply have to look
4 to the --

5 JUSTICE BREYER: What's wrong with the
6 House -- and I'm being a little defensive here -- but I
7 didn't think there was the presumption you are talking
8 about. I thought it said there's a presumption about
9 that procedural rule, and I thought important language
10 was the language that the Court has found the phrase,
11 i.e., for the judge, applicable in the narrow
12 circumstance where contracting parties would likely have
13 expected a Court to have decided the gateway matter.

14 Now, that, it seems to me, a little bit
15 easier to work with than this notion of whether a state
16 gave consent or didn't give consent or it doesn't
17 mention it in the treaty.

18 CHIEF JUSTICE ROBERTS: Briefly.

19 JUSTICE BREYER: Thank you.

20 MS. ANDERS: I think, in the treaty context,
21 the states' parties are not agreeing, and they don't
22 have expectations with respect to the allocation of
23 authority between the court and the arbitrator. What
24 they do agree to are conditions on consent that limit
25 the terms on which the state may be subject to

1 arbitration.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Blackman?

4 ORAL ARGUMENT OF JONATHAN I. BLACKMAN

5 ON BEHALF OF THE RESPONDENT

6 MR. BLACKMAN: Mr. Chief Justice, and may it
7 please the Court:

8 This is a contract formation case, and it's
9 a case that is decided properly by the court below
10 whether you apply first options or whether you apply
11 treaty principles. They --

12 JUSTICE GINSBURG: Mr. Blackman, may I ask
13 you, preliminarily, on your view, what happens next?
14 That -- can this party -- and suppose you're right --
15 can the -- can the BG Group institute an action in
16 Argentina and, if it's not resolved within 18 months,
17 invoke arbitration?

18 MR. BLACKMAN: Absolutely, yes. And my
19 friend conceded that. There is no barrier.

20 JUSTICE GINSBURG: And if it is resolved,
21 but not to BG's liking then, thereto, BG can invoke
22 arbitration?

23 MR. BLACKMAN: That's absolutely correct,
24 Your Honor.

25 JUSTICE GINSBURG: Well, doesn't that mean

1 that the treaty partners agreed that only an arbitration
2 panel can conclusively resolve this dispute?

3 MR. BLACKMAN: What the treaty partners
4 agreed to here, Justice Ginsburg, was a condition -- a
5 precondition on their respectively derogating from their
6 sovereignty. Absent the bilateral investment treaty,
7 there is no basis on which an investor could ever compel
8 one of these states to arbitrate its claims, and its
9 only remedy would lie in the courts of that state.

10 JUSTICE GINSBURG: I don't -- I don't get
11 your answer to my question. Am I wrong in thinking
12 that, under this treaty, the ultimate decisionmaker is
13 the arbitrator. There is no provision for the court to
14 be the ultimate arbiter of the controversy?

15 MR. BLACKMAN: It depends on the issue. The
16 arbitrator will decide the merits, assuming the offer to
17 arbitrate has been accepted according to its terms,
18 which was never done here.

19 After that, depending on the issue, there
20 will or will not be judicial review of some kind, and
21 what this court said, as a matter of U.S. law in First
22 Options and what all the other countries say, and our
23 brief really was not disputed on that point, is that
24 issues of jurisdiction, whether a contract was ever
25 formed, whether there ever was an agreement to arbitrate

1 is ultimately an issue for a court to independently de
2 novo decide.

3 JUSTICE SCALIA: Why -- why are you
4 complaining about the other party not initiating
5 proceedings in the Argentine courts when, if you really
6 wanted those proceedings to occur, you could have
7 initiated proceedings in the Argentine courts?

8 MR. BLACKMAN: First of all, as First Option
9 said, we didn't need to do that. First Option was very
10 clear that it did not require someone who was resisting
11 arbitration and objecting to the arbitrator's
12 jurisdiction because there is no agreement to run to
13 court, which would also be very bad policy.

14 We don't want people running to court. We
15 want them to try an -- an arbitration, but subject to
16 judicial review, if the arbitrators get it wrong on the
17 fundamental jurisdictional question --

18 JUSTICE SCALIA: I must say I
19 don't understand that. When -- when you're appealing to
20 a condition for the thing to occur and you can bring
21 that about as -- as readily as the other side, it's --
22 dog in the manger comes to mind.

23 MR. BLACKMAN: No. We weren't the aggrieved
24 party, Justice Scalia. We were not seeking relief.
25 They're the ones who were complaining. We're -- we're

1 the putative defendant -- the Respondent. There'd be no
2 reason for us to go to court.

3 What our offer to them was, was -- first
4 of all, you have to go to our courts for 18 months. And
5 then it says, in (a)(ii), and it refers specifically to
6 "the aforementioned disputes," i.e., those disputes that
7 have been brought to our courts, those aforementioned
8 disputes can then be arbitrated "under the following
9 circumstances."

10 And the first of those, in (a)(ii) -- (a)(i)
11 is waiting the 18 months. And then, quite importantly,
12 or in (a)(ii)(b) the parties can separately agree to
13 arbitrate. Well, if they don't separately agree to
14 arbitrate, which did not occur here, you have to go
15 through (a)(ii), (a)(i), which is either wait the
16 18 months, so the local court can try to deal with it --
17 I'll tell you why that's important in a moment -- or the
18 local court does actually adjudicate it and then the
19 party who's unhappy with that does have the right then,
20 and then only, to go to arbitrate.

21 And that's the temporal sequence that the
22 D.C. Court talked about. It's set forth in the
23 structure of the treaty that the Chief Justice talked
24 about. You go one, two, three. They're in order for a
25 reason.

1 JUSTICE GINSBURG: That's -- the D.C.
2 Circuit treated this as there is no agreement until you
3 go to the local court first.

4 MR. BLACKMAN: That's correct.

5 JUSTICE GINSBURG: The argument is that
6 there is an agreement to arbitrate. That will be the
7 method of dispute resolution. You have to take certain
8 steps before. So you have to go to the local court.

9 But why isn't the dispute settlement
10 mechanism decided upon by the parties' arbitration, and
11 then what you have to do before that is in the nature of
12 a procedural condition?

13 MR. BLACKMAN: I don't -- I don't think
14 that's the correct analysis, Justice Ginsburg, because
15 the dispute resolution mechanism, which is, again, is an
16 offer made by two states to each other to --

17 JUSTICE KAGAN: Mr. Blackman, can I just ask
18 you to assume for a second that that's not so? If you
19 had -- if BG and the Republic of Argentina had, itself,
20 entered into this agreement, would you agree that this
21 is a typical Howsam kind of provision?

22 MR. BLACKMAN: I would actually not, Your
23 Honor. Howsam -- let's talk about the facts of Howsam.
24 Howsam was -- there was no dispute that there was a
25 contract between the Howsams and the broker/dealer to

1 arbitrate under the NASD rules. Those NASD rules,
2 themselves, contained an eligibility requirement that
3 the claim can't be more than six years old.

4 And those same rules also said the
5 arbitrators get to decide about the interpretation and
6 application of our rules. So it was a
7 classic situation --

8 JUSTICE SOTOMAYOR: So how do you -- how do
9 you distinguish John Wiley, which I think --

10 MR. BLACKMAN: John Wiley --

11 JUSTICE SOTOMAYOR: -- has two components,
12 and the second cuts against you.

13 MR. BLACKMAN: And the first cuts in our
14 favor, Justice Sotomayor. That's exactly right. My
15 friend kept talking about John Wiley as involving only
16 issues of procedural preconditions. But the first part
17 of John Wiley, where the Court says, quite clearly, you
18 have independent judicial review, has to do with whether
19 there is an agreement to arbitrate at all between the
20 parties.

21 In that case, the parties sought to be
22 pulled into arbitration against its will, was a
23 successor -- and the issue which the Court independently
24 decided was, is that successor a party?

25 JUSTICE BREYER: Everybody's getting to the

1 same question, I think, but I haven't quite heard the
2 answer. Of course, you're right in many countries. The
3 question of arbitrability, that is to say, is there a
4 contract is for the Court. In an investment treaty, I
5 can find a lot of authority that says whether this
6 counts as an investment is a matter for the Court.

7 But the question in front of us, is this
8 that kind of decision? Is it one for the Court? Or is
9 it one for the arbitrator? And to just summarize why it
10 might be for the arbitrator, A, it's procedural, but
11 that's not sufficient. B, it refers to UNC -- whatever
12 it is -- UNCITRAL?

13 MR. BLACKMAN: UNCITRAL.

14 JUSTICE BREYER: Yes. It refers to their
15 rules. Their rules provide all matters of competence
16 over the arbitrator. The scholars have done exhaustive
17 work saying most countries think that. The Doctrine of
18 Competence-Competence goes further, and you also have
19 the AAA rules which say the same thing. So those are
20 all against you.

21 For you is the position of the -- the item
22 in the document, first and foremost. All right. I'm
23 trying to summarize what I've got as the arguments for
24 and against. Now, what do you say to make me think
25 there's even more for --

1 MR. BLACKMAN: I agree with you. The text
2 is key, and the text controls. However, I strongly
3 disagree, with all respect, to your statements about
4 Competence-Competence and what other countries do
5 because we have shown, essentially, without dispute
6 here -- and this in the third restatement, and it's in
7 the case law of all these other countries, that
8 Competence-Competence or Competence-Competence, or if
9 you say it in German with a K, all that means is the
10 arbitrators get the first crack --

11 JUSTICE BREYER: So I agree that's not --

12 MR. BLACKMAN: -- it's not the last word.

13 JUSTICE BREYER: But those are not
14 relevant -- I mean, those are relevant. I'm saying they
15 would farther. And I think, in what I've seen so far,
16 it gives, on certain kinds of procedural gateway
17 questions, deference to the arbitrator, which is what is
18 at issue here.

19 And now -- now, I'm back to the same
20 question. What is your evidence from this contract that
21 this is not the kind of gateway question that is for the
22 arbitrator?

23 MR. BLACKMAN: This is -- and, again, my
24 friend conceded this -- this is an offer to a unilateral
25 contract. How does a unilateral contract get formed?

1 Here, we're back at our basic contract formation
2 principle.

3 JUSTICE SCALIA: I don't think he conceded
4 it. He conceded that that was your argument.

5 MR. BLACKMAN: I think that I misheard.
6 (Laughter.)

7 JUSTICE SCALIA: There's a subtle difference
8 between the two.

9 (Laughter.)

10 MR. BLACKMAN: I misheard him. I misheard
11 him then, and I apologize, Justice Scalia. But this is,
12 in fact, if you apply ordinary contract formation
13 principles, as the Court says you must do in First
14 Options and in Granite Rock, if you apply those
15 principles, this is classic offer.

16 And the offer, we all know, has to be met by
17 an acceptance on those terms, not on other terms.

18 JUSTICE ALITO: Well, you said a few minutes
19 ago you were going to explain why this litigation
20 requirement is important. And that is important to me
21 because I don't see what it accomplishes. I can
22 understand a waiting period, but this is more than a
23 waiting period.

24 You have a party who doesn't want to
25 litigate in the -- in the courts of Argentina. It

1 doesn't think it's going to get a fair shake there.
2 What is the point of requiring this -- now, I
3 understand, it's a requirement.

4 But if it's not very important, if it isn't
5 going to achieve anything, that seems to me to weigh
6 against the conclusion that it's a -- that it is a
7 condition of consent.

8 MR. BLACKMAN: It is very important. First
9 of all, as a factual matter, this type of requirement
10 appears in about 8 percent of bids, and it is most
11 prevalent in UK bids, so this is not some weird
12 Argentine thing. The UK thinks this is important. Why?
13 A number of reasons.

14 First of all, a lot of these investment
15 disputes -- in fact, the vast majority -- involve
16 challenge to some local law, some local regulation. And
17 you want to have the local court have the first look at
18 construing it, just as you would construe a statute
19 before you reach the constitutional question.

20 The local court can illuminate the
21 dispute -- the investment treaty dispute by saying, what
22 does our law actually mean? Is our law legal under our
23 Constitution? That's one thing. That's very important.

24 JUSTICE ALITO: Let me just interrupt
25 before -- before the time expires -- but I don't

1 understand -- I don't know what the procedure is in
2 Argentina. Let's assume their civil procedure is like
3 ours.

4 So you say they have to file a complaint.
5 All right. They file a one-page complaint. They do the
6 minimal necessary to keep the case alive in court.
7 Maybe they don't even do that because they don't care;
8 they don't want the thing to be -- to be decided. All
9 they're doing is running out the 18 months. What is
10 achieved by that?

11 MR. BLACKMAN: Well, but that's their
12 choice, which they, in fact, made here, not to avail
13 themselves of the procedure --

14 JUSTICE ALITO: Well, let's say they avail
15 themselves of the procedure in only the most perfunctory
16 way, so as to satisfy the 18-month requirement. But not
17 for the purpose --

18 MR. BLACKMAN: Why should my client be
19 punished because they don't diligently pursue a
20 requirement of our offer. They say, actually, in their
21 brief, in one sentence, we accepted the offer and in the
22 next sentence virtually --

23 JUSTICE ALITO: You're really -- you're not
24 answering --

25 MR. BLACKMAN: -- they say we elected not to

1 follow --

2 JUSTICE SOTOMAYOR: Could you finish your
3 answer?

4 JUSTICE ALITO: You're not answering my
5 question.

6 MR. BLACKMAN: I'm sorry.

7 JUSTICE ALITO: What is -- if they do not
8 litigate the matter in -- in such a way as to get a
9 decision on any of these local law issues, they just
10 keep it alive, perfunctorily, for 18 months. What is
11 achieved by that?

12 MR. BLACKMAN: Well, they have -- well,
13 they've complied with it. But, more importantly, it's
14 what could be achieved if they wanted to achieve
15 something, which is, as I said before, constructions of
16 local law that would bear on the investment dispute.
17 That's important.

18 Narrowing issues, making determinations
19 which are not binding, but which are, nonetheless,
20 perhaps instructive and helpful to the arbitrators.
21 That's another issue.

22 Settlement is another issue. We talked
23 about waiting. We have EEOC. You first have to go to
24 the -- to the commission because this, sometimes, gets
25 settled. If it doesn't get settled, as I say, it can be

1 narrowed. All kinds of things that would be helpful to
2 an ultimate arbitration.

3 And they could win, by the way. They could
4 win.

5 JUSTICE KAGAN: Mr. Blackman, could you sort
6 of indulge an assumption for me? And the assumption is
7 that, if this provision were in an agreement between two
8 parties, we would treat it as a Howsam-John Wiley kind
9 of provision; in other words, we would say that this is
10 just a procedural rule. That's the side of the line it
11 falls on.

12 So my question to you is: Why should this
13 be any different? You're treating yourself as though
14 you never made an agreement. But, in fact, you did make
15 an important agreement. You made an agreement with the
16 U.K., the entire point and purpose of which was to allow
17 U.K. citizens to bring certain kinds of disputes before
18 an arbitrator.

19 So once we have a U.K. citizen with the
20 right kind of dispute, it seems to me you're just in the
21 position of any other person who's agreed to this
22 provision. And in -- in my assumption, if it's a John
23 Wiley type provision, it should go to an arbitrator.

24 MR. BLACKMAN: I have a number of responses
25 to that, Justice Kagan. First of all, I don't think it

1 is just a John Wiley sort of --

2 JUSTICE KAGAN: I know, but I said just
3 assume that for me. And tell me why you are in a
4 position where some other result should go into effect.

5 MR. BLACKMAN: Well, it's kind of assuming
6 the conclusion, if this is just John Wiley, that's a
7 hard case for us, but the structure of the treaty, with
8 all respect, demonstrates it's not, and that would be
9 true even if this was, in fact, a contract between us
10 and BG.

11 If we had a contract with BG that says you
12 have to sue us first, okay, and then, after 18 months,
13 you can arbitrate with us, I don't think we would just
14 assume that that translates into you have to arbitrate
15 with us. They're really suggesting here, Justice Kagan,
16 that this elaborate provision boils down to Argentina
17 promises to arbitrate all investment disputes with BG.
18 That's what it says.

19 CHIEF JUSTICE ROBERTS: Well, the problem
20 is --

21 JUSTICE KAGAN: Please.

22 CHIEF JUSTICE ROBERTS: You're -- it's a
23 point on which I'm regularly confused. You just said if
24 we had this provision in a contract with -- a private
25 contract that said you must sue us, but there, you have

1 already a formed separate agreement to arbitrate.

2 And it seems to me clear that those -- what
3 do you call them, preconditions or whatever, that
4 that -- the argument that that's for the arbitrator to
5 decide. They may well decide that -- you know, you
6 didn't comply, so you don't get to arbitrate.

7 But it seems to me, typically, under First
8 Options and Howsam, that is for the arbitrator. Now,
9 what makes it distinct in your case? What, is it just
10 the order that they're in? Or what? Or is it something
11 special about a sovereign's agreement?

12 MR. BLACKMAN: It's -- it's kind of all of
13 the above. It's the text, the fact that it is, in fact,
14 an offer by a sovereign, rather than an originally
15 bilateral agreement with the private party, but it's
16 also -- and this is much of what the case hinges on, is
17 this an issue of contract formation?

18 If it's an offer, it has to be accepted on
19 its terms. And those are formation issues that go into
20 construing an existing agreement.

21 CHIEF JUSTICE ROBERTS: It all gets down to
22 the question, how do we tell -- you know, the contract
23 formation from the blue paper, right? I mean, if it
24 says -- you know, we agree to arbitrate, and we use
25 these rules and those rules say you have to have it on

1 blue paper, and it's not on blue paper, they say, oh, we
2 didn't agree to have it not on blue paper.

3 How do we distinguish between those two
4 scenarios?

5 MR. BLACKMAN: I -- I think you have to kind
6 of look at the language. And, here, with all respect,
7 it was clear to the circuit. I think it's -- we think
8 it's clear -- that the consent -- which, remember,
9 absent which there would be no arbitration, this is a
10 sovereign, going back to sovereign immunity in our
11 earlier case.

12 Where consent is expressly put -- the word
13 "consent" is not used -- but the clear language of the
14 text and the implications to be drawn from it clearly
15 show that the sovereign is not willing to arbitrate,
16 absent the 18-months' recourse to its courts, you should
17 view that as a condition precedent to a unilateral
18 contract that must be accepted by action.

19 And the action is to bring this suit in the
20 local court and wait 18 months. An analogy, which may
21 not be helpful, but I thought of it, so I'll give it to
22 you. If I'm looking for someone to paint my house and I
23 make an offer to him, I say, I'll hire you to do it if
24 you post the bond. That's an offer to the unilateral
25 contract.

1 He has to post the bond. He can't say, you
2 know, I really don't like the bond, or you want a
3 \$20,000 bond, which isn't my offer, but I'll give you
4 ten; now, we have a contract.

5 But let's assume we now make the contract,
6 and I have progress payments in the contract. Now we
7 have a signed agreement between us that says, I'll pay
8 you -- you know, \$10,000 per floor. That's the kind of
9 condition precedent within the contract that Howsam,
10 perhaps, addresses.

11 But the first one is the formation issue
12 that First Options addresses, did the Kaplans ever make
13 the contract --

14 JUSTICE GINSBURG: Well, what would
15 happen -- what would happen in this case if there was a
16 judge's strike, so none of the courts were operating in
17 Argentina? What would happen then?

18 MR. BLACKMAN: Well, all you have to do is
19 actually file. So even if the courts weren't operating,
20 which is an extreme hypothetical, all you need to do is
21 file and wait the 18 months.

22 JUSTICE KENNEDY: No, but the clerk's office
23 is closed.

24 MR. BLACKMAN: The clerk's office is closed,
25 too?

1 (Laughter.)

2 MR. BLACKMAN: I suspect that the -- there
3 would be a very strong case to be made to the
4 arbitrators that, if the claimant, unlike here, did
5 everything it could to comply -- and here, remember, the
6 claimant deliberately "elected not to comply," the
7 arbitrators might well find that the condition was
8 excused and a reviewing --

9 JUSTICE KENNEDY: No, you can't -- no, you
10 can't say that. You can't say that. There is no
11 arbitration agreement under your -- it would still be
12 for the court.

13 MR. BLACKMAN: Well, there could be an
14 arbitration in the first instance --

15 JUSTICE KENNEDY: Your -- your whole
16 argument gives me intellectual whiplash. You have to
17 say --

18 (Laughter.)

19 JUSTICE KENNEDY: -- well, you have to --
20 you have to go first to the court because that's what
21 the arbitration mechanism provides, but there's no
22 arbitration mechanism.

23 MR. BLACKMAN: No. But, in this case, what
24 would happen would be what happened in First Options and
25 often happens, one party invokes arbitration, and the

1 other party says, I never agreed to arbitrate with you.
2 It would be very imprudent for the defendant in that
3 case to do nothing and default. And you said, in First
4 Options, specifically, you don't need to do that.

5 So you present the issue to the arbitrators
6 and you would then argue that there's no agreement, and
7 the arbitrators would say, well, there is an agreement,
8 or a condition was excused. And, ultimately, on
9 judicial review, on your facts, undoubtedly, a court
10 would be likely to find, well, of course, they did their
11 best, they tried to comply with a condition.

12 But that doesn't affect, to use my friend's
13 terminology, the question presented, which is who
14 decides in the first instance and then finally.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Goldstein, five minutes.

17 REBUTTAL ARGUMENT OF THOMAS GOLDSTEIN

18 ON BEHALF OF THE PETITIONER

19 MR. GOLDSTEIN: Mr. Chief Justice, I do have
20 a rule that distinguishes the A4 paper, and that rule
21 should be, and we think it does follow from the analysis
22 of Howsam, which is just a thinking about when people
23 make agreements and what they expect is that an
24 arbitration agreement is formed and a party consents to
25 arbitration when they guarantee that the ultimate

1 decision can be made by an arbitrator and not a court.
2 It's form selection. We're going to have the ultimate
3 decision made by the arbitrator.

4 And that rule is applied in the investment
5 treaty context as follows: And it is there is consent
6 to arbitration when the investor is guaranteed that
7 their claim can ultimately decide -- be decided by a
8 court, and the state can't force it to be ultimately --
9 excuse me -- by an arbitrator, and the state can't force
10 it to ultimately be decided by a court.

11 And I'll show you where that rule, how that
12 line is divided in this treaty. And that is, I gave you
13 the three conditions at the beginning. Those are not A4
14 paper. You have to be a U.K. investor, you have to have
15 a treaty claim, you have to be suing another party to
16 the treaty.

17 And if those aren't true, then there is no
18 arbitration agreement and Argentina has every reason to
19 say I have no idea why these arbitrators are here, this
20 person's from Ecuador, not from the United Kingdom.

21 But on the other things -- at that point,
22 once -- we are a U.K. investor and we have invested in
23 Argentina, that's the performance that is required, once
24 we did that, then we are protected by Article 8, the
25 dispute resolution provision.

1 And you look at Article 8 and you say, okay,
2 does that guarantee that you have the right to
3 ultimately have it decided by the arbitrators? Or can
4 Argentina actually insist that it will be ultimately
5 decided by a court?

6 And it's the former. We made clear, I
7 think, and nobody disagrees, that they can't force us to
8 go into court and wait for that ruling, take that ruling
9 in any way, shape, or form.

10 Now, my friend says that, look, this is like
11 a unilateral agreement, and this is like where I say
12 I'll hire you to paint my house, if you post a bond.
13 Well, that is a terrible argument for them because this
14 treaty reads as if he was saying, I'll let you paint my
15 house if you post the bond or I post the bond, because,
16 remember, the thing they want us to perform on,
17 supposedly, is something they can do, too.

18 Whoever heard of unilateral agreement that
19 was conditioned on either party doing something?

20 JUSTICE SCALIA: They say that only the
21 complaining party can bring a lawsuit. Evidently, they
22 have no declaratory judgment procedure in Argentina.

23 MR. GOLDSTEIN: That -- I don't believe that
24 is correct, Justice Scalia.

25 JUSTICE SCALIA: I was going to ask them

1 that.

2 MR. GOLDSTEIN: I see. I believe the
3 answer, when this was put to them, his answer to your
4 question was, I just don't have to do that. His view
5 was -- and it's a perfectly fine position to take, and
6 that is he's not going to help me win my case. Fine.

7 But it does describe whether this is a
8 condition of consent, that he could do it, too, and if
9 he could do it, too, it can't be something that he is
10 waiting for me to perform at all.

11 I would say that, on this question of
12 whether it has any value, that all that you got,
13 Justice Alito, was that, if I were to pursue the case in
14 the Argentine courts, maybe something would happen, we
15 might learn a little about Argentine law.

16 First thing's first. I don't have to pursue
17 it. Remember, his whole point is, when asked if the
18 courts were closed, he said, I just have to put the
19 piece of paper down.

20 So if this were a treaty provision that
21 actually involved litigation, involved exhaustion of
22 remedies, where we might learn something, that might be
23 a different case. But this is a waiting period in an
24 Argentine court.

25 And, remember, as well, these are treaty

1 claims, and it is perfectly clear and undisputed that
2 the local court, even if it decided the treaty claims,
3 their ruling would not bind the arbitrators. And so he
4 says, well, hey, we might win.

5 CHIEF JUSTICE ROBERTS: I'm not so sure you
6 don't have to do anything, you just submit the paper.
7 It says you have to submit it to the decision of the
8 competent tribunal. And if the submission requires,
9 okay, now, you have to file your brief, and you say, I'm
10 not going to, I'm not sure that you've submitted it to a
11 tribunal for its decision.

12 MR. GOLDSTEIN: Well, Mr. Chief Justice, I
13 would then say that's a possible argument. But let's
14 figure out who we would ordinary expect to figure that
15 out.

16 This is a treaty provision. It's -- the
17 experts involved in treaty interpretation are the three
18 neutral arbitrators, who really do this every day. It's
19 what they do. They have enormous expertise in
20 interpreting treaties.

21 And so you might say -- and it would be a
22 perfectly valid interpretation, well, maybe submitting
23 it to the local court requires some activity. But do we
24 really expect, when the U.K. and Argentina ended this
25 treaty, that it would actually be the Supreme Court of

1 the United States that would be deciding that question,
2 or instead, the arbitrators?

3 And if you believe it's the arbitrators,
4 then we win, because it's the kind of procedural
5 question that we put to them purposely.

6 CHIEF JUSTICE ROBERTS: That seems that
7 you're not totally circular in begging the question. I
8 don't know that a sovereign would be anxious to submit
9 its sovereignty to three international law experts.

10 MR. GOLDSTEIN: And, surely, they wouldn't,
11 Mr. Chief Justice, but that's the point of the treaty.
12 Remember, my friend said, look, if it weren't for this
13 treaty, we could never sue them. That's the reason
14 there's the treaty because, if there wasn't the treaty
15 and we couldn't get relief from them, we would have
16 never invested.

17 And so the whole point of this treaty is to
18 put these disputes into arbitration. There is no
19 special substantive rights in this treaty. They are all
20 customary international law. The thing that matters in
21 this treaty -- the thing that matters in all the
22 treaties is I don't have to have my case decided by an
23 Argentine court.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
25 The case is submitted.

1 (Whereupon, at 12:11 p.m., the case in the
2 above-entitled matter was submitted.)

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